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No 73-716

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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1973

ROY D. GARNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that evidence obtained by a private search of unclaimed luggage by an airline employee and later disclosed to a federal agent, who examined the luggage and removed it from the custody of the airline on the following day, could not be introduced at his bail revocation hearing.

Following his conviction in August 1970 in the United States District Court for the Central District of California for conspiracy to violate federal gambling statutes, petitioner was released on bond pending appeal. Thereafter the government filed with the sentencing court a motion to revoke the appeal bond and to remand petitioner to the custody of the Attorney General. The basis for the motion was that on December 16, 1971, petitioner had checked certain baggage with an airline in

New York City which had been found to contain, *inter alia*, paraphernalia and drugs used to stimulate and depress race horses. Petitioner moved to suppress the items found in New York City on the ground that they were the product of an unlawful search and seizure. Following a hearing, the district judge denied the motion to suppress and, on March 15, 1972, entered an order revoking petitioner's bond. The order was stayed pending appeal.

On April 5, 1972, petitioner filed a motion with the district court to vacate the revocation of his appeal bond. The district court denied relief, and the court of appeals affirmed on July 6, 1973 (Pet. App. B).[1] Meanwhile, on June 5, 1972, the court of appeals reversed petitioner's conspiracy conviction. Thereafter, rehearing *en banc* was granted. Argument was heard on March 13, 1973; however, no decision has as yet been reached.

Because petitioner's underlying conviction was reversed by a panel of the court of appeals, the United States did not seek petitioner's incarceration following the affirmance of his bail revocation. Nor will the United States move for petitioner's confinement on the gambling conspiracy conviction unless and until the court of appeals, *en banc*, affirms that conviction. In these circumstances all questions concerning the government's efforts to revoke petitioner's bail pending appeal, which are the only matters raised by this petition, are moot. If the court of appeals reverses his conviction, there

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[1]The judgment of the court of appeals was entered on July 6, 1973. A petition for rehearing was denied on August 31, 1973. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to October 30, 1973. The petition was filed on October 31 and is therefore out of time under Rule 22(2) of the Rules of this Court.

will, of course, be no immediate cause for his confinement. If the court of appeals affirms, there would no longer be any occasion to consider the question of bail pending appeal. The question of bail pending a possible petition for a writ of certiorari would be a new question, to be considered and determined at such time as it might arise, and the denial of the instant petition would in no way prejudice petitioner's right to review a later adverse determination on the question of bail—including renewal of his challenge to the evidence in question here, if that is relied upon as a ground for denial of bail at that time.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.

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[2]We believe there is no merit to his contentions either that the search of his abandoned luggage was illegal or that, even if it was, that dictates exclusion of the evidence from a proceeding such as a bail revocation hearing. Cf. *United States* v. *Calandra*, No. 72-734, decided January 8, 1974.

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